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SAVINGS BANK DEPOSITS AS IRREVOCABLE TRUSTS.

The important case of *In Re Totten*, 71 N. E. 748, recently decided in the Court of Appeals of New York, marks a new departure of that court as regards the incidents of trusts created by deposits "in trust" for some designated beneficiary. In the summary of its decision the Court says: "A deposit in a savings bank by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies, or until he completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book, or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance remaining on deposit at the time of the death of the depositor." In this case the Court held that the removal of the fund and the application of it to the depositor's own use amounted to a revocation. The leading New York case hitherto has been *Martin v. Funk*, 75 N. Y. 134, decided in 1878, which held that such a deposit, though for distant relatives of the depositor who knew nothing of the trust until after the depositor's death, created an irrevocable trust. Though somewhat modified by more recent decisions, the authority of that case has not hitherto been disputed. The decision in *Re Totten* gives a thorough review of all the New York cases.

The rule laid down in *Martin v. Funk* seems, in so far as the matter has been adjudicated, to be the law in Connecticut,

Pennsylvania and New Jersey. In *Minor v. Rogers*, 40 Conn. 512, the deposit was held a trust and the beneficiary permitted to follow the funds in the hands of the executors, where the depositor had drawn out all the money and applied it to his own purposes. But in many of the states the rule adopted in Massachusetts in *Brabrook v. Boston Five Cent Savings Bank*, 104 Mass. 228, has been followed, in which the reasoning is practically that now adopted by the New York Court of Appeals. The rule is there laid down that whether the deposit is or is not a trust depends upon the intention of the depositor. Where the fact of the deposit is known to the beneficiary it is held to be strong evidence to establish the existence of a trust. *McCarthy v. Provident Sav. Inst.*, 159 Mass. 527; *Blasdel v. Locke*, 52 N. H. 238. But deposits "in trust" for some named beneficiary are usually made for the purpose of evading the almost universal by-law forbidding more than a specified amount to be deposited in the name of one person. Such an intention the courts hold incompatible with an intention to create a trust, and where the beneficiary is neither party nor privy to the deposit are inclined to deny the existence of a trust. *Brabrook v. Sav. Bk., supra; Gardner v. Merritt*, 32 Md. 78; *Kilpin v. Kilpin*, 1 Myl. and K. 533. In all jurisdictions parol evidence is admissible to establish the depositor's real intention. *Northrop v. Hale*, 72 Me. 275; *Ray v. Simmons*, 11 R. I. 266; *Gerrish v. New Bedford*, 128 Mass. 159.

While the decision in *Re Totten* is doubtless based upon business convenience, that case and those following the Massachusetts decisions would seem to be in disregard of many well-established principles of the law of trusts, with which the cases adhering to the strict rule would seem more strictly in accord. It seems a well-settled principle that a person may by an unequivocal declaration that he so holds, constitute himself trustee of any property which he possesses. *Kekewich v. Manning*, 1 D. M. and G. 176; *Ex parte Pye*, 18 Ves. Jun. 140. The question in each case would seem to be, has or has not the depositor created himself a trustee. If he has, the ordinary incidents of a trust attach. The mere fact that he retains the pass book does not affect his relationship, for, as was said in *Martin v. Funk*, whatever control he may retain is exercised as trustee, and the right to exercise it is not necessarily inconsistent with the existence of a trust. According to the great weight of authority when a trust has attached it is irrevocable in the absence of an express power of revocation or of circumstances indicating the retention of such a power. *Perry on Trusts*, Sec. 104. And this is the law in New York, Massachusetts and New Hampshire. It would seem, too, that where the depositor has so deposited money for the purpose of evading some provision of the law, he ought not be permitted to profit by that fact, since equity will always presume an intention to comply with the law where it must decide between two inconsistent acts.